

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
07/13/2001

*** FILED ***
07/19/2001
CLERK OF THE COURT
FORM L513

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000112
Docket Code 512 Page 1
FILED: _____

STATE OF ARIZONA
v.
KERRY BRIAN LAY

RORIC MASSEY

BRIAN F RUSSO

REMAND DESK CR-CCC
SCOTTSDALE CITY COURT

SCOTTSDALE CITY COURT
Cit. No. #1471580
Charge: 1. ASSAULT
DOB: 02/22/60
DOC: 09/17/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since the time of argument on July 9, 2001, and the Court has considered the arguments of counsel, the record of the proceedings from the trial court, and the Memoranda submitted.

Appellant was accused of committing Assault in violation of A.R.S. Section 13-1203(A)(1), a class 1 misdemeanor alleged to have occurred September 17, 2000. Appellant was convicted after a bench trial on January 3, 2001 and the Court found that the crime was a domestic violence offense.

The only question raised on appeal is whether the crime was a domestic violence offense. Appellant urges that this Court adopt a narrow definition of the phrase "persons of the opposite sex residing or having resided in the same household."¹ Appellee urges that this Court is bound by the conclusions of fact made by the trial court, citing *State v. Lawrence*² and *Yano v. Yano*.³ However, the precise issue presented involves a question of both fact and law which requires that the court review the legal determination *de novo*.

¹ A.R.S. Section 13-3601(A)(1).

² 123 Ariz. 301, 599 P.2d 754(1979).

³ 144 Ariz. 382, 697 P.2d 1132 (App. 1985).

Both parties concede that there are no Arizona cases defining or explaining the terms “residing” or “having resided”. In *State v. Maggio*,⁴ the Arizona Court of Appeals dealt with a similar issue in the context of a criminal probation revocation proceeding. In that case, the Defendant was on lifetime probation for sexual conduct with a minor. One of the many terms of his probation required that he not reside with any child under the age of 18 years without the prior written approval of his probation officer. Defendant and his girlfriend rented a room and, according to the Defendant’s testimony, the cleaning woman’s three children spent the night on the living room floor two nights in a row. According to a probation office surveillance officer, the three children had been residing in the same residence as the Defendant for the preceding four days. Like Appellant in the case before this Court, Defendant Maggio argued to the Court of Appeals that the term reside was too vague. In rejecting his contentions the Court of Appeals found “the three children and the Defendant were staying under the same roof, creating the very situation that the condition of probation was obviously designed to prevent.”⁵

The testimony in this case clearly established that Appellant and his girlfriend, Sylvia Leyva, lived together. Each owned their own home and the couple lived at Ms. Leyva’s home and Appellant’s home, each half of the time. This Court can easily conclude that Appellant and Ms. Leyva resided together dividing their time in two residences. Therefore, this Court concludes that the parties did reside or had resided in the same household within the meaning of A.R.S. Section 13-3601(A)(1).

IT IS ORDERED affirming the judgment of guilt and sentence imposed by the Scottsdale City Court.

IT IS FURTHER ORDERED remanding this matter back to the Scottsdale City Court for all further proceedings.

⁴ 196 Ariz. 321, 996 P.2d 122 (App. 2000).

⁵ 196 Ariz. at 323, 996 P.2d at 124.